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IN THE

Supreme Court of the United States

October Term, 1956

No. 694

SACRAMENTO TELECASTERS, INC., *Petitioner*,

v.

McCLATCHY BROADCASTING COMPANY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CLAIR L. STOUT
THOMAS H. WAKE
JENNINGS H. HEDGEMAN
THOMAS J. DOUGHERTY
600 Munsey Building
Washington 4, D. C.

JOHN J. MANNIX
McClatchy Broadcasting Company
21st and G Streets
Sacramento, California
Attorneys for the Respondent

DOW, LOHNES and ALBERTSON
Of Counsel

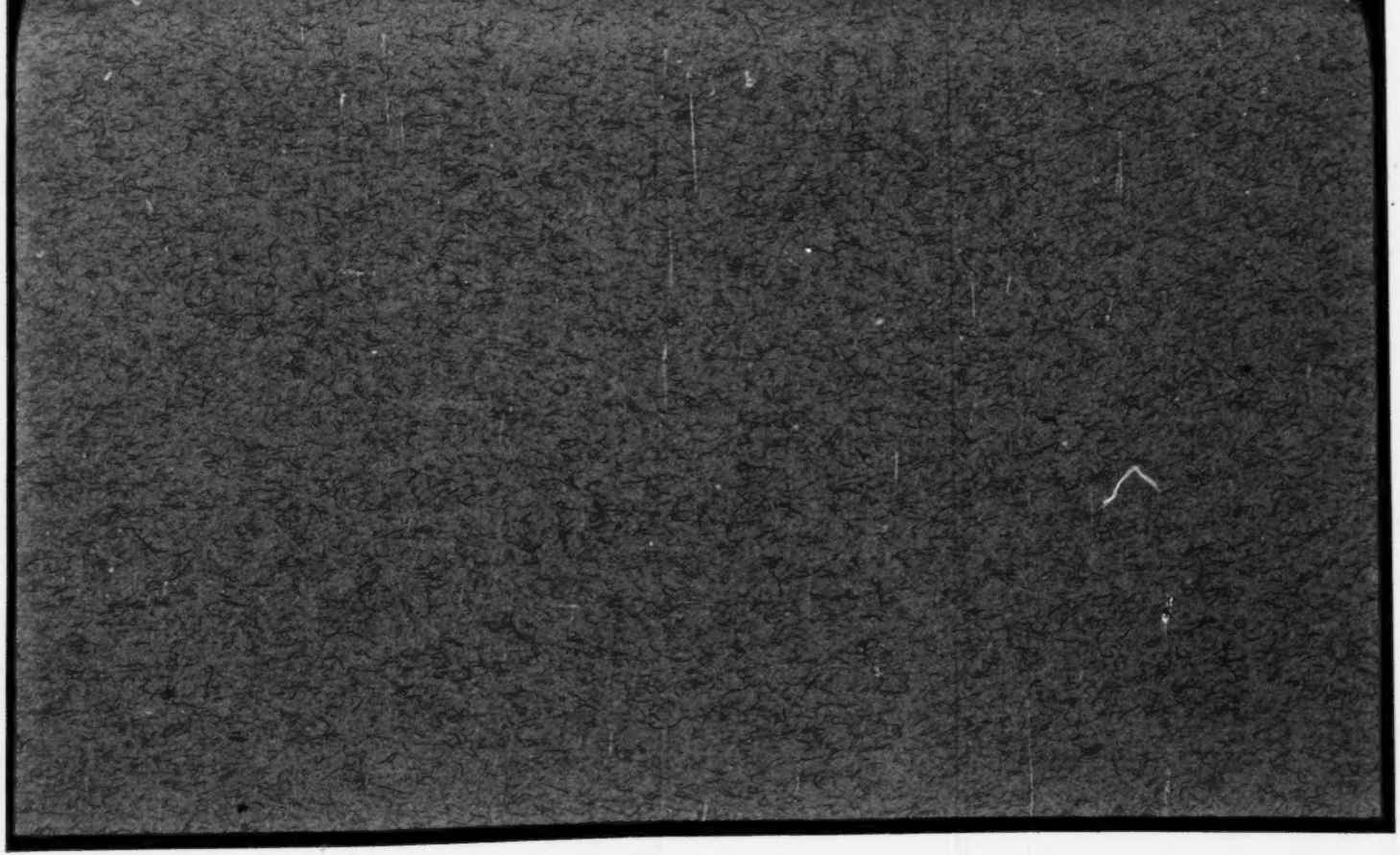


TABLE OF CONTENTS

	Page
Counter-Statement of Question Presented	1
Counter-Statement of the Case	1
Reasons for Denying the Writ	8
1. *Introduction*	8
2. *The Court of Appeals held, in effect, that the Commission abused its discretion*	10
3. *Petitioner's Case*	15
Conclusion	17

CITATIONS

CASES:

Albertson v. *Federal Communications Commission*, 182 F. 2d 397 (1950) 9

Federal Communications Commission v. *WJR*, 337 U.S. 265 (1949) 9, 15

Federal Communications Commission v. *National Broadcasting Co.*, 319 U.S. 239 (1943) 15

Interstate Commerce Commission v. *Jersey City*, 322 U.S. 503 ..... 8, 9, 10, 16

United States v. *Pierce Auto Freight Lines*, 327 U.S. 515 ..... 8, 9, 10, 16

WJR, The Goodwill Station v. *Federal Communications Commission*, 174 F. 2d 226, 243 (dissenting opinion, 1948) 9, 14

STATUTES:

Sec. 405 of the Communications Act of 1934, as amended, 66 Stat. 720, 47 U.S.C. § 405 ..4, 6, 8, 9, 10, 12, 13, 14, 16

DECISIONS OF THE FEDERAL COMMUNICATIONS COMMISSION:

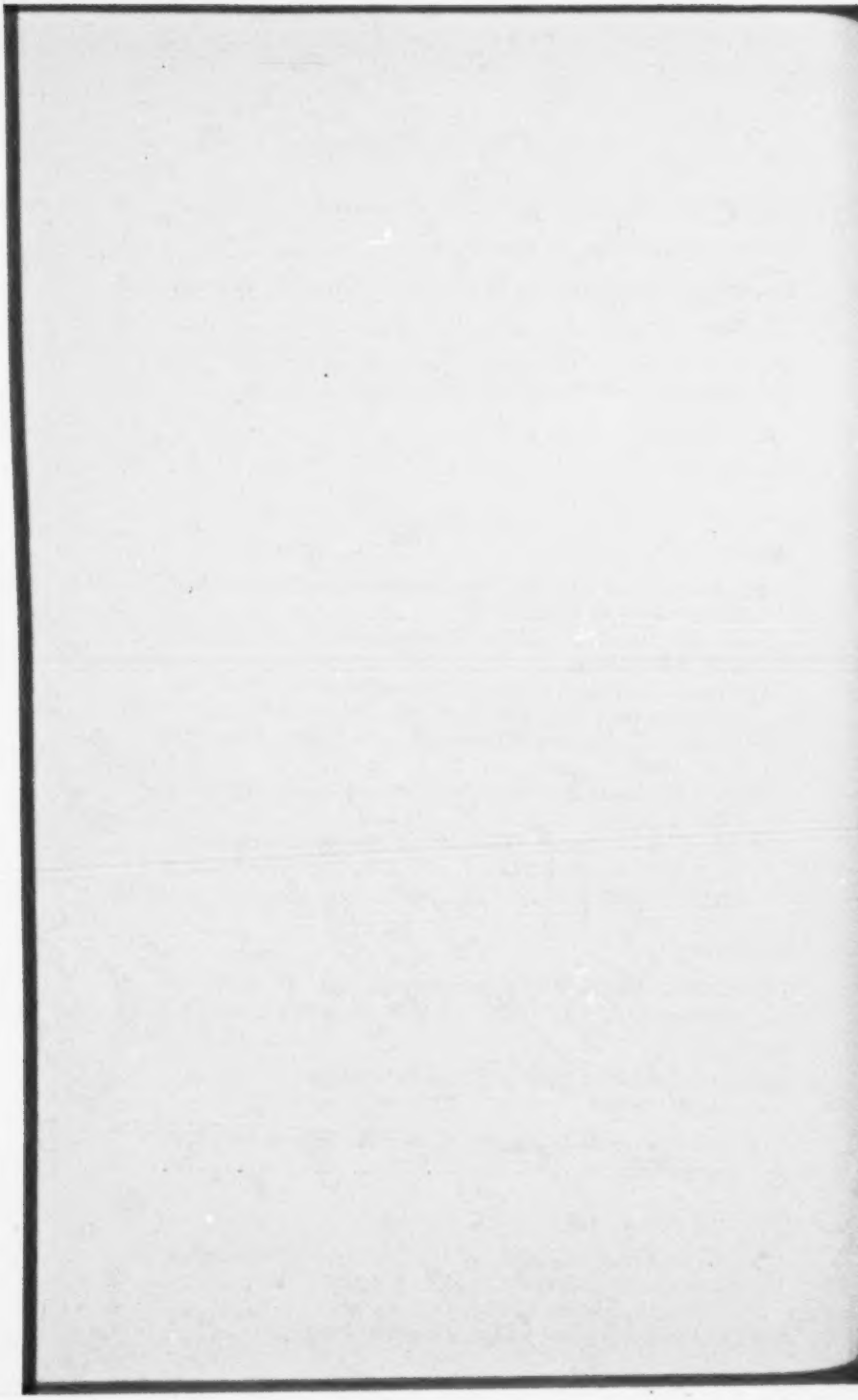
McClatchy Broadcasting Co., 8 Pike & Fischer R.R. 655 (1952) 2

OTHER AUTHORITIES:

Rules and Regulations of the Federal Communications Commission, 47 C.F.R. § 1.365 (1953) 2

FCC Public Notice 13656, Dec. 6, 1954 4

FCC Public Notice 14356, Dec. 14, 1954 4



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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the court below properly concluded, in the circumstances of the case, that the Federal Communications Commission erred in denying respondent's petition for a hearing on petitioner's application for modification of a television construction permit.

COUNTER STATEMENT OF THE CASE

In order that the decision of the court below may be interpreted properly, it is necessary to set forth, in detail, considerable background material which petitioner has omitted to mention.

On July 23, 1952, the Federal Communications Commission designated for consolidated hearing the mutually exclusive applications of McClatchy Broadcasting Company and Sacramento Telecasters, Inc., for a new television station to operate on Channel 10 in Sacramento, California.[1] Both applications specified transmitter and antenna sites on land owned by the State of California at Pine Hill, California. (R. 25.)[2]

After the comparative hearing had commenced, Telecasters sought leave to amend its application to increase the height of its antenna structure and to change the type of the antenna, making Telecasters' proposed coverage substantially equal to the coverage proposed by McClatchy. (R. 26.) McClatchy opposed the amendment on the ground that its true purpose was to improve Telecasters' chance of success in the hearing by the removal of a comparative disadvantage, and that Telecasters had not demonstrated "good cause"[3] for the allowance of the amendment. Nevertheless, the Examiner granted the petition for leave to amend.[4] (*Ibid.*) As a result thereof, McClatchy stipulated with

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[1] McClatchy Broadcasting Company, respondent, will sometimes hereinafter be referred to as "McClatchy"; Sacramento Telecasters, Inc., petitioner, will sometimes hereinafter be referred to as "Telecasters"; and the Federal Communications Commission will hereinafter be referred to as "Commission".

[2] Record citations to the record in this case will be indicated as follows: "(R.)". References will also be made herein to the record in a companion case, No. 733, 1956 Term, presently pending before this Court. Citations to the record in No. 733 will be indicated as follows: "(733-R.)".

[3] Section 1.365 of the Commission's Rules and Regulations, 47 C.F.R. § 1.365 (1953).

[4] See McClatchy Broadcasting Co., 8 Pike & Fischer R.R. 655, 657-58 (1952).

Telecasters that there would be no substantial difference in coverage between the two proposals from an engineering standpoint. (R. 61-62.)

Prior to the amendment of Telecasters' application, McClatchy clearly could have relied on the greater height of its proposed antenna, and the resultant greater coverage, as a comparative factor in its favor. The allowance of the amendment, and the stipulation which followed, removed the issue of coverage from the case.[5]

Thereafter, following a 48-day hearing, the Examiner released an Initial Decision granting the application of McClatchy and denying the mutually exclusive application of Telecasters. However, on October 4, 1954, the Commission reversed the Initial Decision, and granted Telecasters' application. The Examiner had found McClatchy to be the superior applicant, concluding that the program service rendered by McClatchy's existing broadcast facilities had been consonant with licensee responsibilities; that in the nonprogramming field McClatchy's record of performance was "truly impressive"; and, in the field of public service, McClatchy's record, "viewed in its entirety, is symbolic of the type of activity that has made radio the great medium it is today." (733-R. 46, 52.)

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[5] As the court below noted in note 1 of its opinion, the stipulation contained a pertinent reservation, as follows:

> "'*In the absence of circumstances not now known to the parties herein or disclosed by their respective applications,* it is further stipulated and agreed that all of the counsel for the respective applicants and Commission counsel hereby waive cross-examination on the matters covered by this stipulation, and in addition, waive the right to present other evidence thereon.'" (Emphasis supplied by court below.)

The Commission's decision recognized the superiority of McClatchy over Telecasters, but nevertheless awarded the television grant to Telecasters on the sole ground that McClatchy had newspaper and radio interests. (733-R. 55 *et seq.*) McClatchy thereupon appealed the comparative case to the Court of Appeals.

On November 26, 1954, just 53 days after the Commission had granted Telecasters a construction permit pursuant to the comparative hearing, and while that case was pending on appeal in the Court of Appeals, Telecasters filed an application with the Commission for modification of its newly obtained construction permit to specify, among other changes, a new and different location for its transmitter and antenna. (R. 129.) The modification application sought to change the site from Pine Hill to Logtown, California, which resulted in a reduction in coverage. (*Ibid.*) Although public announcement of the filing of that application was not given until December 6, 1954 (FCC Public Notice 13656) the Commission granted the modification application without hearing on December 9, 1954.[6] (R. 129.)

On January 13, 1955, McClatchy petitioned the Commission, pursuant to Section 405 of the Communications Act of 1934, as amended, 66 Stat. 720, 47 U.S.C. § 405, to: (1) stay the grant of Telecasters' modification application; (2) set that application for hearing to determine whether a grant thereof is in the public interest; and (3) make McClatchy and the Commission's Broadcast Bureau parties respondent to the hearing so ordered. (R. 23.) McClatchy argued,

[6] Public announcement of the grant of the modification application was not made until December 14, 1954. FCC Public Notice 14356.

inter alia, that it had standing to take issue with the grant of the modification because, as the losing applicant in the comparative case, it was adversely affected and seriously aggrieved since the grant of the modification wiped out part of the basis for the comparative decision. (R. 24, 27, 39-42.) With respect to the matter of coverage, McClatchy showed, among other things, that Telecasters' modification proposal "provides less coverage than any proposal heretofore advanced by Telecasters" (R. 32.); and that Telecasters' construction permit, as modified, "contemplates an alarmingly inferior proposal when compared to the coverage which would have been afforded the Sacramento area had the application of McClatchy Broadcasting Company been granted" (R. 33.).[7] A comprehensive engineering report was submitted to demonstrate the reduced coverage and intensity of signal as a result of Telecasters' change of antenna site. (R. 43-59.)

On January 24, 1955, Telecasters filed an opposition to the McClatchy petition. (R. 62-84.) Significantly, however, that opposition did not deny that the coverage under the modified construction permit would be significantly less than the coverage proposed by it or by McClatchy in the comparative hearing. Accepting the fact of reduced coverage, Telecasters merely argued that, "all things considered," the new Logtown site is better than the Pine Hills site. (R. 81-82.)

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[7] McClatchy's petition also made allegations regarding the change in studio location covered by the modification, and false representations made by Telecasters both to the Commission and to the people of the Sacramento area in connection with the changes embraced in the modification application. In view of the narrowness of the question presented to the Court by petitioner, it is unnecessary to burden this opposition with those phases of this case.

On March 18, 1955, by its memorandum opinion and order the Commission denied McClatchy's petition. (R. 128-138.) The Commission held that McClatchy was not a party aggrieved by the order granting Telecasters' modification application, and that therefore McClatchy did not have standing under § 405 of the Act to request reconsideration of the Commission's action. After so holding, the Commission, "on its own motion", proceeded to examine "*some* of the allegations made in this case"—"the allegations of McClatchy relating to false representations made by Telecasters to the Commission and to the people of the Sacramento area." (Emphasis supplied.) (R. 132, 133.) On the basis of the pleadings before it, the Commission rejected McClatchy's allegations of misrepresentation on the part of Telecasters. However, again significantly, the Commission did not deny, but rather recognized, that coverage from the Logtown site would be substantially less than from the Pine Hill site. (R. 135, 136.) Its only conclusions touching the matter of reduced coverage were to the effect that the pleadings would not sustain a finding of fraud or misrepresentation by Telecasters with respect to coverage.

Thereupon, on April 12, 1955, respondent appealed to the Court of Appeals from the order of the Commission denying its petition to set Telecasters' modification application for hearing. (R. 4-14.) As of that date, respondent's appeal in the comparative case was still pending in the same court. On January 27, 1956, the Court of Appeals handed down its decision affirming the Commission in the comparative case (Court of Appeals Case No. 12,470). See Appendix to Petition for Certiorari in No. 733, 1956 term, p. 1. The court, however, found "much in support of the examiner's position concerning diversification of control", and

stated that "the examiner's choice of McClatchy as superior in all respects except diversification of control is strongly supported by the proof. . . . " (*Id.*, at 6 and 7-8.) Respondent moved the court for rehearing in that case, pointing out the pendency of the appeal in the modification case (Court of Appeals Case No. 12,637) and the interrelationship between the two cases. The court granted rehearing on May 10, 1956, and at the same time consolidated the two appeals for further argument.

On October 18, 1956, the Court of Appeals rendered both its decision on rehearing in the comparative case (No. 12,470) and its decision in the modification case (No. 12,637). Although finding the Appeal in No. 12,470, a *"close case, since the Commission found McClatchy superior in important aspects of comparison"* (Emphasis supplied), the court again affirmed the Commission.[8] In No. 12,637, the modification case, the court held that McClatchy, as the losing applicant in the comparative case, did have standing to seek a hearing on Telecasters' modification application (Petition App. 7a, 9a, 10a), and further that the Commission erred in refusing McClatchy a hearing on its petition therefor. The court ordered the Commission to *"conduct an evidentiary hearing on the protest and then decide whether to set aside the modified grant to Telecasters, or the modification and the original grant as well; and in either event to consider what action thereafter would be appropriate."* (Emphasis supplied) (Petition App. 10a.)

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[8] As previously suggested, respondent has filed a petition for certiorari to review the judgment of the Court of Appeals in No. 12,470. That petition is pending before this Court as No. 733, 1957 Term, and raises the question whether the Commission had the power to award the original grant to Telecasters on the sole ground that McClatchy has newspaper and broadcasting interests in the area involved.

REASONS FOR DENYING THE WRIT

1. Introduction

The basic premise upon which petitioner proceeds before this Court is that "the court below did not hold that, on the particular facts presented, the Commission had abused its discretion." (Petition 7.) Therefore, the petitioner reasons, the court erred in reversing the Commission since petitions for rehearing under § 405 of the Act are addressed to the sound discretion of the Commission. And further, petitioner notes and relies upon cases decided by this Court[9] which hold that, as a general rule, administrative agency decisions on petitions for rehearing are discretionary rulings which "will be upheld unless clearly erroneous." (Petition 9.)

The difficulty with petitioner's argument is that it assumes an erroneous premise. It is true that the court below did not use the term "abuse of discretion" in its opinion. However, an examination of the opinion in the light of the facts presented will demonstrate that the court did apply the proper standards for review of the Commission's action.

As a preliminary matter, it is important to observe that respondent's petition to the Commission did not seek rehearing in the sense that it was asking the Commission to provide another or further hearing. Rather, respondent sought to be heard for the first time with respect to the propriety of petitioner's modification application. Since the Commission had already granted Telecasters' modification, respondent's

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[9] *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 534-535; *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514-515.

petition was one which, procedurally speaking, sought reconsideration of a Commission order. In that sense the petition was one for "rehearing" under § 405 of the Act. However, substantively, the petition was one for intervention and hearing, not rehearing. It asked that McClatchy be made a party to the modification proceeding and that a hearing be held on the modification application. See *WJR, The Goodwill Station* v. *Federal Communications Commission,* 174 F. 2d 226, 243 (dissenting opinion, 1948); *Federal Communications Commission* v. *WJR,* 337 U.S. 265, 280 (1948); *Albertson* v. *Federal Communications Commission,* 182 F. 2d 397 (1950). In effect, respondent was in the same position with respect to its attack on the Commission's order granting Telecasters' modification application as it would have been had it made the attack on the application prior to the grant.[10] Intervention and initial hearing were sought by respondent; not a second or supplemental hearing in a proceeding in which respondent had already once been heard.

It is apparent from the above clarification that, even without regard to other considerations, the decision below is not in conflict with either *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, or *Inter-*

[10] In this connection it should be noted that there is no statutory or other provision which required McClatchy to complain of the modification before the grant thereof. In fact, the Act contemplates that attacks such as the one involved here will be made after grant of the application. See §§ 405 and 309(c) of the Act, petition pp. 3-4. Moreover, even assuming an attack such as this is permissible prior to grant, as a practical matter McClatchy had no opportunity to make its complaint before the modification application was granted. The Commission granted the application just three days after public notice of its filing was issued. And public notice of the grant was not given until five days after the effective date of the grant. See Counter-Statement, *supra,* p. 4.

state Commerce Commission v. *Jersey City*, 322 U.S. 503. In both of those cases the Court held that, in the circumstances, the Interstate Commerce Commission had not abused its discretion in denying petitions for rehearing. However, unlike the present case, the parties who filed for rehearing in the *Pierce* and *Jersey City* cases had participated in the agency proceedings which resulted in the order sought to be reconsidered on rehearing. In the instant case, when McClatchy filed its § 405 petition, it had not yet had an opportunity to participate in any way in the proceedings which led to the modification order.

This is not to say that respondent's § 405-petition did not call for an exercise of the Commission's discretion. Section 405 itself is in terms of agency discretion. However, the fact that McClatchy's petition was, in substance, one for intervention and hearing, as distinguished from one for further hearing and reconsideration by a party who had already participated, points up that the court below, without violating the principle or rationale of *Pierce* or *Jersey City*, could find an abuse of Commission discretion here.

2. The Court of Appeals Held, in Effect, That the Commission Abused Its Discretion

A large part of the opinion below is devoted to a discussion of the facts and circumstances which led the court to conclude that McClatchy had standing under § 405. In the court below, both petitioner and the Commission took the position that respondent had no standing either as a licensee of a standard broadcast station in Sacramento or as the losing applicant in the comparative television proceeding. For purposes of its present petition for certiorari, petitioner

now accepts the ruling of the Court of Appeals that respondent had standing to challenge the modification grant as the losing applicant in the comparative case. (See Petition, p. 6, note 2.) Petitioner then attempts to create the illusion that nothing said in the opinion below up to and including the holding on the issue of standing, is material to the question presented to this Court. In effect, petitioner wants the Court to view the last two pages of the opinion below *in vacuo,* without taking into account the basis or ramifications of the court's holding on the issue of standing. Such a reading of the opinion is unrealistic and inaccurate.

As previously noted, the Commission granted Telecasters' modification application at a time when the appeal in the comparative proceeding was pending. The court viewed this situation with considerable alarm. In this connection, the court stated:

> "But if, while the appeal [in the comparative case] was pending here, the Commission desired, without a hearing, to modify the granted construction permit so drastically as to make it a different permit from that which we were considering, it should have notified the court it was withdrawing the grant under appeal, whereupon the appeal would have been dismissed as moot. In that event, undoubtedly McClatchy would be deemed to have standing to protest the issuance of a modified permit *and demand a hearing.* If on the other hand, the Commission desired merely to consider whether to approve a proposed modification which would, in effect, substitute a new permit for that on appeal, it should have moved that the case be remanded for that purpose. In that event also McClatchy would have been entitled to protest *and be heard.* * * *
>
> "It would obviously be unseemly for the Commission, without the knowledge or permission of

> the court, to substitute another grant for that which is being judicially examined on appeal, leaving the court with the time consuming and difficult task of reaching a decision as to the validity of a construction permit which has long since ceased to exist. * * * It [the Commission] should not render an appeal moot without the court's knowledge or consent by in effect substituting a new and different order for that which is under challenge." (Emphasis supplied.) (Petition App. 6a-7a).

Thus, the court was of the view that McClatchy was entitled to a further *comparative* hearing if the modified permit issued to petitioner was a "new and different permit"[11] from that which was originally issued pursuant to the comparative case.[12] Under this rationale, McClatchy would have a right to the further comparative hearing upon proof that the modified permit represented a "new and different permit." The court clearly viewed McClatchy's § 405-petition as raising the question whether that condition was met. In other words, the court was of the view that respondent had alleged facts in its § 405-petition which, if true, would prove that the modification was "such a drastic change in the permit as to make it a new grant." (Petition App. 8a.) Those allegations, coupled with the *right* to further *comparative* hearing upon proof

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[11] A "new and different permit" was defined by the court as one embodying a change in "some of the basic characteristics of a construction permit." (Petition App. 7a).

[12] Note also the last paragraph of the opinion below where the court instructs the Commission to "conduct and evidentiary hearing on the protest and then decide whether to set aside either the modified grant to Telecasters, or the modification *and the original grant as well* . . ." (Emphasis supplied.)

thereof, gave respondent standing to raise the allegations and attendant issues under § 405.

What allegations in the § 405-petition did the court view as raising the issue whether the modification resulted in a "new and different permit"? Early in its opinion, the court detailed the circumstances which led to the removal of the coverage issue from the comparative case. It alluded to the fact that, over McClatchy's objection, Telecasters had amended its proposal during the comparative hearing to increase its antenna height; it noted the stipulation which followed the allowance of the amendment; it referred to the fact that the modification approved a change by Telecasters to a different transmitter and antenna site than the site proposed by both applicants in the comparative case, as well as a reduction in antenna height; it noted that the Commission recognized the modification as involving "somewhat reduced coverage for Telecasters' station" (Petition App. 4a, note 2); and, of course, it had before it McClatchy's substantially uncontradicted factual allegations showing a significant reduction in coverage, and was, in addition, aware of the fact that the comparative case was, at best, a "close case." With these matters in mind, the court stated:

> "In these circumstances, it seems clear that the Commission erred in saying McClatchy had no standing to protest. Particularly is this true in view of the charge that Telecasters had never intended to honor its mid-hearing proposal to match the coverage proposed by McClatchy, but fraudulently intended merely to gain a competitive advantage in the hearing. *If the reduction in coverage had been proposed during the hearing, obviously McClatchy might have had in its su-*

perior coverage proposal an additional preference which might have turned the balance in its favor.

"All that has been said depends, of course, upon the assumption that the modification was such a drastic change in the permit as to make it a new grant which, when considered in connection with McClatchy's charge of fraud, might not be in the public interest. *Whether so or not was a mixed question of fact and policy which should have been considered in a hearing.* * * *" (Emphasis supplied.) (Petition App. 7a-8a).

The court could have concluded its opinion at that point. If it had done so there would have been no doubt that the holding, in effect, was that the Commission, under the circumstances, had abused its discretion in denying respondent a hearing on its § 405-petition. In view of the claim by respondent that the modification substantially reduced the coverage, and in view of the admissions by Telecasters that there was a reduction in coverage, the pleadings, at the very least, presented a substantial question as to whether respondent had a right to further comparative consideration with Telecasters. Accepting the existence of such a right if the original grant was superseded by the modification (which petitioner must do in the light of its decision not to attack the holding below with respect to the standing issue), and accepting as factual respondent's allegations of reduced coverage (which petitioner must likewise do since those allegations were not controverted before the Commission or denied by either the Commission or petitioner in the Court of Appeals), the conclusion necessarily follows that the Commission abused its discretion in refusing to grant respondent a hearing. See *WJR, The Goodwill Station* v. *Federal Communi-*

cations Commission, 174 F. 2d 226, 245 (dissenting opinion, 1948); *cf., Federal Communications Commission* v. *WJR,* 337 U.S. 265 (1949), and *Federal Communications Commission* v. *National Broadcasting Co.,* 319 U.S. 239 (1943).

3. Petitioner's Case

After holding that the Commission erred in not giving respondent a hearing, the court below proceeded with a discussion of the Commission's gratuitous treatment of *some* (but not all) of the allegations made by respondent.[13] With respect to those allegations, the court stated that the Commission could not resolve the issues raised thereby by a "summary decision on the pleadings." (Petition App. 9a.) And the court supported that conclusion by borrowing specific quotations from cases construing § 309(c) of the Act. Petitioner bases its entire petition for certiorari on this portion of the court's opinion. However the significance of that portion of the opinion is patently *de minimis* in the context of the entire controversy. Before the court reached the discussion which the petitioner attacks, it had already held that the Commission committed reversible error in denying respondent a hearing. Thus, to some degree the statements of the court regarding the Commission's summary treatment of certain issues are *obiter dicta.* Moreover, any reasons which may exist in favor of summary disposition

[13] It will be recalled that the Commission initially held that respondent had no standing to attack the modified grant. Nevertheless, on its own motion, it considered respondent's allegations of misrepresentation on the part of petitioner, and rejected them on the basis of the pleadings. The Commission, however, did not consider the merits of respondent's charge that the modification resulted in a substantial reduction in coverage. It conceded that coverage was reduced by the modification.

of petitions for rehearing under the doctrine of *United States* v. *Pierce Auto Freight Lines, supra,* and *Interstate Commerce Commission* v. *Jersey City, supra,* and which are otherwise applicable to requests for initial hearing and intervention, evaporate as to respondent's allegations of misrepresentation when, as the court initially held, a hearing on the § 405-petition is nevertheless required as a result of the allegations of reduced coverage. Stated otherwise, since here the issue of reduced coverage gave a right to an evidentiary hearing on its § 405-petition, it neither violates § 405 of the Act nor the doctrine of the *Pierce* and *Jersey City* cases to require the Commission to await decision on any other issues until after the required hearing is held and the record therefrom is developed.[14]

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[14] Petitioner also argues that the holding below "must be interpreted as a deliberate application of the mandatory hearing standard embodied in the protest provision [viz., § 309(c) prior to the 1956 amendment thereto] . . . to a petition for rehearing under Section 405." (Petition 8-9) This argument is based on the fact that the court quoted from § 309(c) cases when discussing the propriety of the Commission's summary treatment of the misrepresentation issues. If this portion of the court's opinion is not *dictum,* the most which can be said with respect to the court's reliance on the § 309(c) cases is that, where a hearing is otherwise *required* pursuant to a § 405 petition in the nature of a petition to intervene, the court is of the opinion that the considerations behind the *mandatory* hearing requirements of the unamended § 309(c) apply to preclude summary disposition by the Commission of any subsidiary issue. Such a holding is extremely logical since § 309(c) is a statutory provision specifically available to test grants without hearing. Thus, any protest under § 309(c), like the § 405-petition in this case, is in the nature of a petition to intervene.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari to review the judgment of the Court of Appeals should be denied.

However, in the event the Court should grant the petition, it is urged and respectfully submitted that the petition for a writ of certiorari in No. 733, 1956 Term, likewise should be granted. The argument above should make clear that the merits of the comparative case, the subject matter of the petition in No. 733, bore upon and influenced the Court of Appeals' decision in the case sought to be reviewed here. The present case was not decided by the court below as an isolated controversy wholly disconnected from the comparative case. Both proceedings before the Commission—the comparative case and the modification case—were before the Court of Appeals at the same time. The former was characterized by the court as being a "close case". Respondent has argued as petitioner in No. 733 that that proceeding was unlawfully decided by the Commission in favor of Telecasters on the basis of an illegal policy of discrimination, and was, therefore, erroneously affirmed by the court. Immediately upon the heels of that proceeding, and while it was pending on appeal in the Court of Appeals, the Commission not only permitted Telecasters to modify its recently acquired construction permit in such a way as to further detract from the comparative desirability of its proposed operation over the operation proposed by McClatchy, but the Commission allowed the modification without giving McClatchy any hearing on the propriety thereof. The discrimination in the comparative proceeding was compounded by the arbitrariness

in the modification proceeding. Under the circumstances, it would be unrealistic and impossible to review the second phase of this litigation without contemporaneously having the first phase thereof before the Court.

Respectfully submitted,

CLAIR L. STOUT
THOMAS H. WALL
JEROME H. HECKMAN
THOMAS J. DOUGHERTY
600 Munsey Building
Washington 4, D. C.

JOHN J. HAMLYN
McClatchy Broadcasting
Company
21st and Q Streets
Sacramento, California
Attorneys for the Respondent

DOW, LOHNES and ALBERTSON
Of Counsel

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DWIGHT D. DOTY
J. ROGER WOLLENBERG
Haley, Doty & Wollenberg
1735 DeSales Street, N. W.
Washington 6, D. C.
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY TO OPPOSITIONS

In the petition for certiorari it was pointed out that the court below has in effect read out of the Communications Act the important discretionary power explicity vested by Congress in the Federal Communications Commission in Section 405 of the Act. The Government concedes that if the court below has enunciated a general rule that petitions for rehearing filed under Section 405 of the Act, 47 U.S.C. 405, require the same mandatory hearings as protests filed under

Section 309(c), 47 U.S.C. 309(c), an important question would be presented (Gov't. Opp. 2.) But the Government denies that the decision below is properly so to be interpreted. It asserts that "we believe that the court below either acted upon the assumption that McClatchy's pleading was a protest under Section 309(c) or held that the Commission had abused its discretion * * *" (*ibid.*).

Examination of the opinion below demonstrates that the Government's interpretation is quite barren of foundation. By explicitly stating in its opinion that the case arose under Section 405 (Pet. App. 4a), the court of appeals gave irrefutable evidence of its knowledge of that fact. In light of this reference to Section 405 (and a subsequent reference (Pet. App. 5a)), this Court surely will not presume that the court below (which heard oral argument in this case twice) was unaware of the basic nature of the case.[1]

The Government's alternative theory is, if anything, even less tenable. Although not a word is found in the opinion below to suggest that the lower court thought it was dealing with a discretionary matter, the Government suggests (without record citation) that the court may have intended to hold that there was an abuse of discretion. To reach its conclusion, the Government is forced to disregard the only language in the court's opinion which deals with the question whether McClatchy, assuming it had standing,[2] was entitled to an evidentiary hearing (Pet. App.

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[1] Emphasis was also placed upon the distinction between a Section 405 case and a Section 309(c) case in petitioner's brief in the court below (Intervenor's Br. 17-19).

[2] McClatchy's standing is not in issue in the petition for certiorari.

9a-10a). That language is not addressed to the facts of this case, but to decisions interpreting Section 309(c)—decisions which give full scope to a mandatory statutory right to a hearing where a valid protest is filed to a Commission decision made without hearing.

Respondent also seeks to refashion the decision below by interpretation, but respondent takes a different approach. Respondent suggests that the only language in the opinion below dealing with McClatchy's right, assuming standing, to an evidentiary hearing is "to some degree" *obiter dicta* (Resp. Opp. 15). If the language upon which petitioner relies (Pet. App. 9a-10a) were *obiter dicta,* the decision below would be without a holding on McClatchy's asserted right to a hearing. For the remainder of the court's opinion is devoted to the standing issue.

In sum, if the court below was aware that this was a Section 405 case (and its opinion unmistakably indicates that it was aware of that fact), the only reasonable inference from its holding is that it was misapplying the standard of Section 309(c) to a Section 405 case on the theory that cases arising under the two sections are to be treated as identical. For the reasons set forth in the petition for certiorari, that theory is clearly erroneous. And, as the Government concedes (Gov't. Opp. 2), such a holding would present an important question for review. If, on the other hand, the Court was proceeding in complete confusion as to the nature of the case before it (as the Government implies) or was merely engaging in *obiter dicta* in the dispositive portion of its decision (as respondent suggests), it would appear that the court below has so far departed from the proper course of judicial administration that this Court should exercise its supervisory function.

CONCLUSION

For the foregoing reasons, and those stated in the petition for certiorari, the petition should be granted. If this Court is of the view that there is doubt as to the actual holding below, it is respectfully suggested that the decision below be vacated and the case remanded in order to give the court below an opportunity to reconsider its decision in light of the applicable statutory standard.

Respectfully submitted,

DWIGHT D. DOTY
J. ROGER WOLLENBERG
Haley, Doty & Wollenberg
1735 DeSales Street, N. W.
Washington 6, D. C.
Attorneys for Petitioner

February 19, 1957

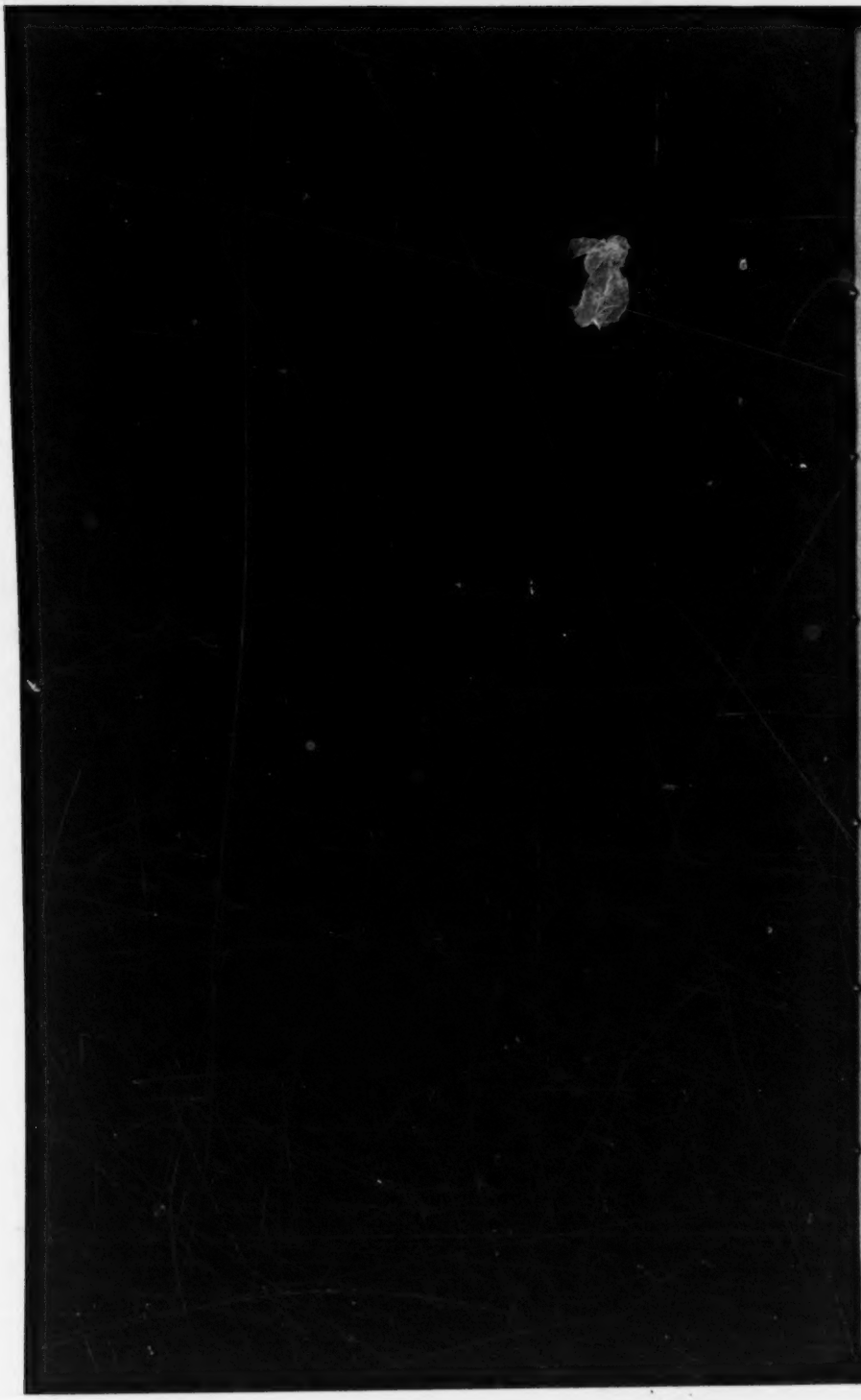

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	2
Reasons for Granting the Writ	8
Introduction	8
I. The Decision of the Commission, Affirmed by the Court Below, Represents a Major and Dangerous Extension of Previous Commission Policy	12
II. The Decision Below Represents a Major and Dangerous Extension of Previous Appellate Court Decisions Touching the Question Presented, and Is Not in Accord With Previous Pronouncements of This Court	17
III. The Question Presented Is of Tremendous Importance in the Future Administration of the Communications Act	23
IV. The Commission's Application of the Diversification Policy Is Contrary to Congressional Intent	26
Conclusion	31

CITATIONS

CASES:

Federal Communications Commission v. *Allentown Broadcasting Co.*, 349 U.S. 358 (1955) 20
Federal Communications Commission v. *Pottsville Broadcasting Company*, 309 U.S. 134 (1940) ..15, 21, 22
Federal Communications Commission v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940) 19, 21

Page

Federal Communications Commission v. *R.C.A. Communications,* 346 U.S. 86 (1953) 22, 23
Federal Radio Commission v. *Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266, (1933) 21
Johnston Broadcasting Co. v. *Federal Communications Commission,* 85 U.S. App. D.C. 40, 175 F.2d 351 (1949) 21
Mansfield Journal Co. v. *Federal Communications Commission,* 86 U.S. App. D.C. 102, 180 F.2d 28 (1950) 11
National Broadcasting Co. v. *United States,* 319 U.S. 190 (1943) 21, 22
Scripps-Howard Radio, Inc. v. *Federal Communications Commission,* 89 U.S. App. D.C. 13, 189 F.2d 677, cert. denied, 342 U.S. 830 (1951) ..7, 17, 18, 20, 30
Stahlman v. *Federal Communications Commission,* 75 U.S. App. D.C. 176, 126 F.2d 124 (1942) ..17, 19, 20
Tri-State Broadcasting Co., Inc. v. *Federal Communications Commission,* 68 App. D.C. 292, 96 F.2d 564 (1938) 17, 19
United States v. *Storer Broadcasting Company,* 351 U.S. 192 (1956) 10, 20

STATUTES:

Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009 7
Communications Act of 1934, as amended, 48 Stat. 1064, 47 U.S.C. 151, *et seq.* 2, 26
§ 307 21
§ 309 21
§ 310 21
§ 402(b)(1) 7

DECISIONS OF THE FEDERAL COMMUNICATIONS COMMISSION:

Arkansas-Oklahoma Broadcasting Corp., 3 Pike & Fischer R.R. 479 (1946) 15
Barnes and Weiland, 8 F.C.C. 46 (Dissenting Opinion, 1940) 15
Beatrice Cobb, 3 Pike & Fischer R.R. 540 (1946)... 14

Page

Bell Broadcasting Company, 3 F.C.C. 90 (1936).... 13
Belleville News-Democrat, 4 Pike & Fischer R.R. 1043 (1950) 16
Bend Bulletin, 5 F.C.C. 447 (1938)..... 13
Commercial Radio Equipment Co., 3 Pike & Fischer R.R. 310 (1946) 15
Dorrance D. Roderick, 5 F.C.C. 563 (1938)..... 13
Finlay and Finlay, 4 F.C.C. 356 (1937) 13
Hartford Broadcasting Co., Inc., 2 F.C.C. 330 (1936) 14
Hearst Radio, Inc., 6 Pike & Fischer R.R. 994 (1951) 15, 30
Lubbock County Broadcasting Co., 6 Pike & Fischer R.R. 949 (1951) 15
Mason City Broadcast Company, 3 F.C.C. 116 (1936) 13
Meadville Tribune Broadcasting Co., 3 Pike & Fischer R.R. 544 (1946) 15
Midland Broadcasting Co., 3 Pike & Fischer R.R. 1961 (1948) 16
Nashville Radio Corp., 3 Pike & Fischer R.R. 515 (1946) 14
Northwestern Publishing Company, 5 F.C.C. 321 (1938) 13
Orlando Daily Newspapers, Inc., 3 Pike & Fischer R.R. 949 (1951) 15
Permian Basin Broadcasting Co., 3 Pike & Fischer R.R. 324 (1946) 15
Providence Journal Co., 3 Pike & Fischer R.R. 1509 (1947) 16
Roderick T. Peacock, Sr., 3 Pike & Fischer R.R. 564 (1946) 14
Southern Tier Radio Service, Inc., 3 Pike & Fischer R.R. 211 (1946) 14
Stevens and Stevens, d/b/a Port Huron Broadcasting Co., 5 F.C.C. 177 (1938) 14
Telegraph Herald, 4 F.C.C. 392 (1937) 13
The Hampton-Hampshire Corp. (WHYN), 4 Pike & Fischer R.R. 504 (1949) 16
The Observer Radio Co., 3 Pike & Fischer R.R. 234 (1946) 14
United States Broadcasting Corp., 2 F.C.C. 208 (1935) 14
Voice of Augusta, Inc., 3 Pike & Fischer R.R. 434 (1946) 14

Page

WJR, The Goodwill Station, Inc., 9 Pike & Fischer R.R. 227 (1953) 16

OTHER AUTHORITIES:

F.C.C. Document No. 40263, "Television Applications In Hearing Status December 31, 1956." 24
Federal Communications Commission Order No. 79 13
Federal Communications Commission Order No. 79A 13
H. R. Rep. No. 1750 to accompany S. 658, p. 9 29
H. R. Rep. No. 2426, 82nd Cong., 2nd Sess. (1952), 18-19 .....27, 29
Rules and Regulations of the Federal Communications Commission, Section 3.636, 47 C.F.R. § 3.636 10
S. Rep. 741, 81st Cong., 1st Sess. (1949), 2-3 .....27, 28
2 Pike & Fischer R.R., Digest § 53.24, pp. 2551-2676 14

Supreme Court of the United States

OCTOBER TERM, 1956

No.

MCCLATCHY BROADCASTING COMPANY, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The Initial Decision of the Examiner (R. 15) is unreported. The Decision of the Federal Communications Commission (R. 55) is unofficially reported at 9 Pike & Fischer R.R. 1190. The original opinion of the Court of Appeals (R. 341, App. 1) and the opinion of the Court of Appeals on rehearing (R. 351, App. 9) are not yet received.

JURISDICTION

The original judgment of the Court of Appeals was entered on January 27, 1956. A timely petition for

rehearing was granted on May 10, 1956, and on the same date the original judgment was vacated. (R. 350) Following rehearing, the judgment of the Court of Appeals was entered on November 1, 1956. (R. 361, App. 18). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission, after a comparative hearing between two competing applicants for a television station, has the power to award the grant to one applicant on the sole ground that the other applicant has newspaper and broadcasting interests in the area involved.

STATUTES INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151, *et seq.*, are set forth in the Appendix, *infra*, p. 19.

STATEMENT

On July 23, 1952, the Federal Communications Commission designated for consolidated hearing the mutually exclusive applications of McClatchy Broadcasting Company and Sacramento Telecasters, Inc., for a new television station to operate on Channel 10 in Sacramento, California.[1]

After a 48-day hearing, the Examiner released an Initial Decision granting the application of McClatchy

[1] McClatchy Broadcasting Company, petitioner, will sometimes hereinafter be referred to as "McClatchy;" the Federal Communications Commission, respondent, will hereinafter be referred to as "Commission;" and Sacramento Telecasters, Inc., intervenor below, will hereinafter be referred to as "Telecasters."

and denying the mutually exclusive application of Telecasters (R. 15, 54). The Examiner concluded that both applicants met the minimum statutory qualifications (R. 15), and then proceeded to determine, on a comparative basis, which of the two applications should be granted.

The Examiner found McClatchy superior to Telecasters in all areas where a significant difference existed between the applicants, save one—diversification of the media of mass communication (R. 52-53). Although the Examiner awarded Telecasters a preference on this factor, he concluded that McClatchy was not disqualified from receiving a grant inasmuch as (1) McClatchy had not evidenced any monopolistic practices in the operation of its broadcast facilities or its newspapers; (2) McClatchy had not evidenced any monopolistic tendencies; and (3) McClatchy clearly would not have a local monopoly of the media for mass communication in view of the "multiplicity" of other broadcasting stations and newspapers in the area to be served (R. 43-44). The Examiner awarded McClatchy decisional preferences in three separate areas of comparison as follows: (1) its methods of ascertaining audience program requirements and preferences is more realistic and far superior to that of Telecasters (R. 45-46); (2) its proposed television "operation will be integrated into a large well-organized and eminently experienced public information organization that will offer advantages to its personnel and afford a background of know-how concerning the utilization of broadcast equipment and facilities that a newcomer to the field could not hope to match" (R. 44-45); and (3) McClatchy's long record of service in the public interest gives assurance

that the facility sought will render an outstanding service (R. 46-53). The Examiner held the latter preference determinative.[2] He concluded that the program service rendered by McClatchy's broadcast facilities had been consonant with the responsibilities of a licensee; that in the non-programming field McClatchy's record of performance was "truly impressive"; and, in the field of public service, McClatchy's record, "viewed in its entirety, is symbolic the type of activitiy that has made radio the great medium it is today" (R. 46, 52).

On October 4, 1954, after exceptions had been filed and oral argument had before the Commission, that agency released its Decision (R. 55), reversing the Examiner's Initial Decision and granting Telecasters' application (R. 118-119). The Commission found both applicants basically qualified and gave McClatchy

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[2] The following language of the Examiner summarizes McClatchy's public service record:

> "The foregoing record of technical expertise, improvement of facilities, experimentation with new developments and media, willingness to enter new fields, disposition to keep faith with audience at financial loss, initiative and cooperation concerning such problems as national defense and allocation of channels, desire for accurate knowledge of listener preferences and requirements, and civic activity, coupled with the fact that it has lived up to its obligations programwise, amply support McClatchy's contention that it is entitled to preference because of its long history of operation in the public interest. We might add that, in our opinion, the above record, viewed in its entirety, is symbolic of the type of activity that has made radio the great medium it is today. To those who would say such activity has been dictated by self-interest we reply that, if so, it has been an enlightened self-interest and highly beneficial to the public." (R. 52).

preferences as follows: (1) McClatchy was awarded a preference because of "... the integration of its television operation with a large and experienced organization, and the broadcast experience available as a result thereof" (R. 108-109); and (2) McClatchy was awarded a preference because it was more likely to effectuate its proposal than was Telecasters (R. 114). Up to this point in the Decision, Telecasters received no final preference on any comparative factor.[3]

The Commission then came to the consideration which it held "determinative" of the proceeding (R. 114). It noted that McClatchy has newspaper and

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[3] It should be noted that the Commission's discussion leading to the conclusion numbered (2) above, is embraced in three paragraphs of the Decision, *viz.*, Paragraphs 9-11 of the Conclusions, R. 109-114. The Commission *assumed* that Telecasters was entitled to what might be termed "intermediate preference" with respect to local ownership, participation in civic life of the community, integration of ownership with management, and diversification of business background. (R. 112-113). (Note that the Commission stated that "*If we were to compare* the applicants solely on these bases of criteria . . . we would find that Telecasters merits a distinct preference." (Emphasis supplied.) But no such comparison was ever made and the assumed conclusion is, therefore, baseless.) Moreover, those factors only "aid . . . in the evaluation of the applicants with respect to their awareness and responsiveness to the needs of the community and the probability of the effectuation of their program proposals." (R. 109-110). They are "only guideposts or presumptions for determining which applicant is more likely to carry out its proposal and remain alert to the area's needs." (R. 113). These "intermediate preferences" awarded Telecasters were not only without basis in this record, but, if accepted, were overridden by McClatchy's "outstanding record affirmatively demonstrating performance," giving McClatchy the final preference with respect to reliability of its proposals. (R. 114).

radio broadcasting interests in and around the area to be served,[4] while Telecasters has no such interests. It then held as follows:

> "The facts in this case boil down to a comparison of an applicant with an excellent record of past performance with all the attendant advantages that accrue, and on the other hand, an applicant without a record of past performance but affording assurances that its operation will be in the public interest. We conclude that under these circumstances *the superiority McClatchy has demonstrated with respect to certain factors does not outweigh the comparative advantage adhering to Telecasters because of its freedom from ties with other radio, newspaper and television interests in Sacramento as well as throughout the Central Valleys.* Telecasters will bring a new view and another directly competitive service to the area which will not be just a further extension of an existing service." (Emphasis supplied.) (R. 118).

In sum, the Commission denied McClatchy's application and granted that of Telecasters, in spite of its findings that McClatchy has a long history of service in the public interest; it proposed a well-balanced program schedule; and there was more likelihood that McClatchy would effectuate its proposals. And the Commission took this action on the basis of a "policy" which, as revealed in its Decision, favors diversity of

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[4] See Commission's Finding No. 29 (R. 80-81) and Conclusion No. 14 (R. 116-117). The Commission did not deny, but apparently adopted, the Examiner's Findings that McClatchy had no monopoly of the media of mass communications in the area, that no threat of such a monopoly existed, and that McClatchy did not engage in monopolistic practices or evidence monopolistic tendencies. *Cf.*, R. 115.

the media of mass communications for diversity's sake alone.[5]

McClatchy took a timely appeal to the Court of Appeals pursuant to the provisions of Section 402(b)(1) of the Communications Act of 1934, as amended (48 Stat. 1093, 47 U.S.C. § 402(b)), and Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U.S.C. § 1009). The Court of Appeals, although finding much "in support of the examiner's position concerning diversification of control" (R. 347, App. 6), affirmed the Commission's Decision. The court, relying on its prior decision in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 89 U.S. App. D.C. 13, 189 F.2d 677 (1951), held that "the Commission is entitled to consider diversification of control [of the media of mass communications] in connection with all other relevant facts *and to attach such significance to it as its judgment dictates.*" (Emphasis supplied.) And the court further stated that

[5] "'• • • But where one applicant is free of association with existing media of communication, and the other is not, the Commission, in the interest of competition and consequent diversity, which as we have seen is a part of the public interest, may let its judgment be influenced favorably toward the applicant whose situation promises to promote diversity.'" (R. 115-116).

"The fact that there may be some diversification of ownership in the communities as a result of the existence of a competing newspaper and other individually owned broadcast stations does not mean that the principle of encouraging further diversification is no longer valid. . . ." (R. 117).

"'. . . where there is a choice between two applicants, one of whom has a television station and another which does not, public interest is better served by granting a license to the newcomer other factors being substantially equal rather than to the person already having a television station. • • •'" (R. 117-118).

"the Commission is free to let diversification of control of communications facilities turn the balance, if it reasonably concludes that it is proper to do so." *Ibid.* Rehearing was granted, but the court again affirmed the Commission's decision (R. 353, App. 11).[6]

REASONS FOR GRANTING THE WRIT

Introduction

Despite the superiority of McClatchy in every area of comparison where final preferences were awarded,[7]

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[6] In its order granting rehearing, the Court of Appeals consolidated this case (Court of Appeals No. 12,470) with an appeal in a companion case (Court of Appeals No. 12,637). In its opinion of October 18, 1956, the court first considered this case (No. 12,470) on rehearing, and again affirmed the Commission. The court then considered the companion appeal (No. 12,637) and reversed the Commission. Telecasters, the intervenor in both cases in the Court of Appeals, has filed a petition for a writ of certiorari in No. 12,637, which petition is presently pending before this Court as No. 694, 1956 term.

[7] The preferences which were given McClatchy were characterized as "slight" by the Commission in its decision (R. 109, 114). Petitioner argued below that the Commission was arbitrary in these characterizations, and moreover that it should have been preferred in numerous other areas of comparison.

The Court of Appeals noted that the Commission "did not find McClatchy superior in every area of comparison save that of diversification", and that the Commission "found McClatchy superior in some respects and Telecasters superior in some . . . ." These statements may be thought to infer that Telecasters was awarded one or more "final" comparative preferences aside from diversification. Such an inference is refuted by the record. The preferences which the Commission attributed to Telecasters were mere assumptions on the Commission's part and, moreover, were only "intermediate" in character. See note 3, *supra*. The court's decision is premised ultimately on the conclusion that, aside

save in the area of diversification of mass media, the Commission concluded that McClatchy was to be denied the license merely because it was engaged in the businesses of newspaper publication and broadcasting. In order to put this holding in proper perspective, it is important to note the following uncontroverted facts:

1. Neither the Commission nor the Examiner found that a monopoly of the media of mass communication in the area involved would be established or threatened by a grant to petitioner.[8] A graphic demonstration that no threat of monopoly of the mass media in the area is even remotely possible, is the fact that, aside from any media owned by petitioner, there are 28 daily newspapers, 8 Sunday papers, 68 weekly papers, 51 broadcasting stations, and 3 other allocated television stations in the service area of the television station which is the subject matter of this litigation (R. 43-44, 117).

2. It was never contended by any party in the proceeding, nor was it concluded or intimated in either the Initial Decision of the Examiner or the final Decision

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from the diversification issue, the Commission "did not find, on the whole, *preponderant* superiority in either applicant"—that the Commission found McClatchy and Telecasters "*almost* in balance". (Emphasis supplied). (R. 345, App. 4.) Even accepting either the Commission's or the court's characterization of McClatchy's superiority, the fact remains that McClatchy was, to some degree, the better applicant. Therefore, under any view with respect to the degree of McClatchy's supriority, McClatchy should have prevailed over Telecasters if it was error to employ the diversification policy against McClatchy.

[8] The Examiner expressly held that "Neither monopoly nor the threat of monopoly is present here" (R. 43). The Commission, in effect, adopted that finding (R. 115). See note 4, *supra*.

of the Commission, that McClatchy has ever *engaged* in any activity of the type considered indicative of monopolistic intent or conduct.[9]

3. There was no suggestion by the Commission that a grant to the petitioner would have been contrary to the public interest because of a resulting over-concentration of control of mass communication media. Petitioner recognizes that the Commission has the power to adopt rules "to limit the number of stations consistent with a permissible 'concentration of control' ", for purposes of "public protection against such concentration." *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956). But a grant to petitioner of the license here sought would not have violated the Commission's Multiple Ownership Rules which were approved by this Court in the *Storer* case, *supra*. McClatchy was seeking its first VHF television facility, while the Rules permit a single licensee to have a total of five such facilities.[10] While the policy against concentration of broadcast facilities in the hands of a few is, perhaps, related to the policy

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[9] The Examiner's words, uncontradicted by the Commission or any evidence in the record, were as follows:

> "This record is barren of any evidence that McClatchy has ever engaged in any of those activities frequently associated with monopolistic conduct in the public information field, e.g., cut-throat rate slashes, personnel pirating, violent interference with distribution, or in fact has ever engaged in any concerted action designed to squeeze competitors out of its fields of activity" (R. 43).

[10] Of the total of seven television facilities authorized for a single licensee, no more than five may be VHF channels. Rules and Regulations of the Federal Communications Commission, Section 3.636, 47 C.F.R. § 3.636. McClatchy is the permittee of one UHF facility—KMJ-TV, Fresno, California.

favoring diversification of mass media, the two are not identical.[11] The Commission in effect has held that, while no improper concentration of control would flow from a grant to McClatchy—*viz.*, no concentration such as would adversely affect the public interest, nevertheless the public interest would be better served by a grant of the license here involved to an otherwise inferior applicant.

In view of these uncontroverted facts, and inasmuch as the Commission's Decision admits the overall superiority of McClatchy aside from any diversification considerations, it is clear that the Commission found against petitioner on the ground of diversification for diversification's sake alone.[12] The Commission's only reason for preferring Telecasters was that Telecasters' principals were engaged in other types of business activities, while McClatchy was engaged, albeit admirably, in serving the public through mass media. This petition seeks review of the Commission's power and authority under the law to deny a grant to an applicant, found otherwise superior to its competitor in a comparative proceeding, *solely* because of its ownership of broadcasting stations or newspapers.[13]

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[11] And see note 25, *infra*.

[12] See note 5, *supra*.

Petitioner concedes that, if its past record had revealed misconduct either indicating monopolistic purpose or any other untoward activity, the Commission could properly have made adverse conclusions on these scores and weighed these conclusions against the applicant. See *Mansfield Journal Co.* v. *Federal Communications Commission*, 86 U.S. App. D.C. 102, 180 F.2d 28 (1950).

[13] Petitioner recognizes that the Court of Appeals stated that the Commission "did not deny it [McClatchy] the construction permit solely because of its ownership of newspapers and broadcasting

I.

The Decision of the Commission, Affirmed by the Court Below, Represents a Major and Dangerous Extension of Previous Commission Policy

Never before in the entire history of federal radio regulation has the Commission held that an applicant otherwise superior to its competitor in a comparative hearing should be denied solely because of its interests in other media. Until the year 1940, just prior to the time the Commission commenced its abortive

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stations" (R. 345, App. 4). But there the court only had reference to the fact that Telecasters was assumed to have certain factors in its favor. However, as previously noted, those factors, in any event, were merely "presumptive" and "intermediate", and were overridden by McClatchy's "final" preference in the area of reliability. See notes 3 and 7, *supra*. Moreover, the court accepted the Commission's statement of the question presented on appeal. That question admitted that the Commission found "differences" between McClatchy and Telecasters, aside from the diversification issue, although those differences were only "slight" (R. 346, App. 5). Certainly in accepting that statement of the question the court understood that, while the "differences" may have been merely "slight", they were, nevertheless, ultimately in McClatchy's favor. The Commission's Decision would permit no other understanding. See again notes 3 and 7, *supra*, and R. 118, where the Commission's Decision states:

> "We conclude that under the circumstances *the superiority McClatchy has demonstrated* with respect to certain factors does not outweigh the comparative advantages adhering to Telecasters because of its freedom from ties with other radio, newspaper, and television interests. . . ." (Emphasis supplied.)

Accordingly, the Commission reached its conclusion by weighing McClatchy's superiorities against only one thing—Telecasters' freedom from mass media associations.

"newspaper investigation",[14] there was, as a general rule, no effort made to penalize applicants because of ownership of newspapers or other broadcast facilities.[15] In many cases the ownership of other mass media was a factor in favor of an applicant over its competitor, as it was recognized that mass media applicants have

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[14] On March 20, 1941, the Commission issued its Order No. 79, F.C.C. Mimeo No. 48496, which was later supplemented by Order 79-A, F.C.C. Mimeo No. 79-A, July 1, 1941. These Orders commenced (in the guise of a rule-making proceeding) the so-called "newspaper investigation." (See App. 53, 55.)

The authority of the Commission to consider the subjects outlined in Orders 79 and 79-A was tested in *Stahlman* v. *Federal Communications Commission*, 75 U.S. App. D.C. 176, 126 F.2d 124 (1942), and although the court upheld the Commission's authority to conduct its proposed investigation, it was made clear that the Commission could not promulgate a rule or policy, the result of which would be to place applicants in a proscribed class merely because of their other lawful business interests.

The Commission issued its public notice terminating the newspaper investigation after this Court's decision was handed down in the *Stahlman* case (App. 57). This notice recited that, while the Commissoin had decided not to adopt any general rule with respect to newspaper ownership of broadcast stations, and while the Commission did not feel that it should deny a license merely because the applicant is engaged or interested in a particular type of business, it did not intend to permit concentration of control of broadcast facilities in the hands of a few to the exclusion of the many who may be *equally well qualified* to render such public service.

[15] See *e.g.*, *Bell Broadcasting Company*, 3 F.C.C. 90 (1936); *Mason City Broadcast Company*, 3 F.C.C. 116 (1936); *Finlay and Finlay*, 4 F.C.C. 356 (1937); *Telegraph Herald*, 4 F.C.C. 392 (1937); *Northwestern Publishing Company*, 5 F.C.C. 321 (1938); *Bend Bulletin*, 5 F.C.C. 447 (1938); *Dorrance D. Roderick*, 5 F.C.C. 563 (1938).

an intimate knowledge of the community and, hence, are capable of rendering a better service to the public.[16]

It was not until 1940 that the Commission's so-called policy in favor of diversification of control of the media of mass communication began to assume significance. Since that time, the policy has been involved in a tremendous number of Commission cases.[17] However, never until now has it been held that the bare policy of diversification was so omnipotent that it warranted a grant to a competitive applicant who received no final preference on any other comparative ground, and who, instead, was inferior in all of the other areas where final preferences were awarded.[18] In fact, there have been

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[16] See *e.g.*, *Hartford Broadcasting Co., Inc.*, 2 F.C.C. 330 (1936); *United States Broadcasting Corp.*, 2 F.C.C. 208 (1935).

[17] See 2 Pike & Fischer R.R., Digest § 53.24, pp. 2551-2676.

[18] The major Commission cases since 1940 in which non-mass media applicants were preferred partially on the basis of the diversification factor clearly reveal that in these cases the non-mass media applicants prevailed either because a local monopoly was threatened or because they were superior on other grounds as well. See *Stevens and Stevens, d/b/a Port Huron Broadcasting Co.*, 5 F.C.C. 177, 182 (1938) (Broadcast experience and priority of filing); *Southern Tier Radio Service, Inc.*, 3 Pike & Fischer R.R. 211, 221 (1946) (Broadcast experience); *The Observer Radio Co.*, 3 Pike & Fischer R.R. 234, 242 (1946) (Better operating plans, staff, more integration of ownership and management and local ownership); *Voice of Augusta, Inc.*, 3 Pike & Fischer R.R. 434, 446 (1946) (Better program plans and local ownership); *Beatrice Cobb*, 3 Pike & Fischer R.R. 540, 543 (1946) (Integration of ownership and management); *Nashville Radio Corp.*, 3 Pike & Fischer R.R. 515, 522 (1946) (Integration of ownership and management, local ownership, more complete showing); *Roderick T. Peacock, Sr.*, 3 Pike & Fischer R.R. 564,

cases where the Commission did not consider diversification at all in granting licenses to otherwise superior applicants, and in all other cases, superior mass-media applicants received grants so long as no local monopoly situation was threatened.[19]

By 1951 the diversification principle was applied, as a general rule, "only when a grant would tend toward creating a local monopoly in the channels for the public expression of opinion and in the dissemination of news and information . . ." *Barnes and Weiland,* 8 F.C.C. 46, 54 (Dissenting Opinion, 1940). And see *Orlando Daily Newspapers, Inc.,* 3 Pike & Fischer R.R. 624, 631 (1951); *Lubbock County Broadcasting Co.,* 6 Pike & Fischer R.R. 949, 983 (1951); and *Hearst Radio, Inc.,* 6 Pike & Fischer R.R. 994, 1031, 1032 (1951).[20] Other Commission cases give

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571 (1946) (Local ownership, better program plans); *Arkansas-Oklahoma Broadcasting Corp.,* 3 Pike & Fischer R.R. 479, 484 (1946) (Threat of local monopoly and evidence of monopolistic tendency by newspaper applicant); *Meadville Tribune Broadcasting Co.,* 3 Pike & Fischer R.R. 544, 548 (1946) (Newspaper applicant controlled by the only two local papers and no other local radio station).

[19] See *e.g., Commercial Radio Equipment Co.,* 3 Pike & Fischer R.R. 310 (1946); *Permian Basin Broadcasting Co.,* 3 Pike & Fischer R.R. 324 (1946).

[20] This proceeding involved the application of Hearst for a renewal of license and the application of Public Service Radio Corporation for the facilities licensed to Hearst. The applications were consolidated for comparative hearing. Section 307(d) of the Act then provided that the granting of applications for renewal of license shall be limited to and governed by the same consideration which affect the granting of original applications. See *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134 (1940). Therefore, the principles evolved in *Hearst* should be no different than if both applicants were apply-

further evidence of the limitations on the diversification principle which previously obtained.[21]

Briefly stated, the diversification factor in comparative cases has been receiving increasingly more significance from the Commission over the past fifteen years. Until the present case, that factor was consistently related to the public interest in terms of monopolization of local channels of public information and expression. The factor has not only grown tremendously in its importance in the eyes of the Commission, but, in the present case, it has now been elevated so that it can be applied by itself, without relating it to monopolization or even to over-concentration of broadcast control, as a "determinative" consideration, overriding any contrary superiorities.

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ing for the facilities for the first time. The Commission cites principles evolved in Hearst to be of general applicability. See *WJR, The Goodwill Station, Inc.*, 9 Pike & Fischer R.R. 227, 260d (1954).

[21] See *Providence Journal Co.*, 3 Pike & Fischer R.R. 1509, 1511-1512 (1947), where the Commission stated that, "In view of the fact that 6 AM and 5 other FM broadcast stations have been authorized in Providence and Pawtucket, it is apparent that a grant of the Providence Journal Company's application would not result in granting to that applicant a monopoly over the broadcast of news"; *Midland Broadcasting Co.*, 3 Pike & Fischer R.R. 1961 (1948), where the Commission showed its concern with monopoly in the form of community influence; *The Hampton-Hampshire Corp.* (WHYN), 4 Pike & Fischer R.R. 504, 517 (1949), where the Commission stated that, "The record does not disclose that the applicant has indulged in any monopolistic practices in the past . . ."; and *Belleville News-Democrat*, 4 Pike & Fischer R.R. 1043, 1058b (1950), where it was stated that, "there is no basis for concluding that the applicant would engage in monopolistic practices or that the grant of this application would not serve the public interest."

II.

The Decision Below Represents a Major and Dangerous Extension of Previous Appellate Court Decisions Touching the Question Presented, and Is Not in Accord With Previous Pronouncements of This Court

Prior to the present decision of the Court of Appeals, the leading case touching the question of the legality of the Commission's diversification policy was *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 89 U.S. App. D.C. 13, 189 F.2d 677, cert. denied, 342 U.S. 830 (1951). In that case the court upheld the Commission's power to attach significance to or let its judgment be influenced by the fact that one applicant is disassociated from existing media of mass communication while the other is not. The court held that diversity might be considered as an element of preference, and that the Commission, in the interest of competition, might let its judgment be influenced favorably toward an applicant who had no connection with existing media. There was no intimation by the court that it was overruling *Tri-State Broadcasting Co., Inc.* v. *Federal Communications Commission,* 68 App. D.C. 292, 96 F.2d 564 (1938), or *Stahlman* v. *Federal Communications Commission,* 75 U.S. App. D.C. 176, 126 F.2d 124 (1942), wherein the Commission was flatly warned that it could not deny an application because the applicant is otherwise engaged in the dissemination of news. Nor did the court indicate in *Scripps-Howard* that it was giving the Commission *carte blanche* to deny a superior applicant solely because of the diversity factor. But instead, it held that diversity was merely an element of preference, which is important only as it affects the service to be

provided. The end result—the service to be provided —was still the paramount consideration.[22]

Thus, the decision in *Scripps-Howard* was not itself broad enough to control the decision in the instant case. There, diversification was only one of several factors favoring the grant to the successful applicant, while in the instant case it was the *only* factor relied upon as favoring a grant of Telecasters' application. The present case represents a major and dangerous extension of the policy which was before the Court of Appeals in *Scripps-Howard*. The court below has now approved the Commission's power to hold one applicant superior to another and nevertheless to award the grant in issue to the other simply because the superior applicant has mass-media associations.

In the instant case, the Commission and the court below have enlarged the scope of *Scripps Howard* to an extent where public interest is not the controlling factor in granting an application. Instead, an ill-defined and unreasoned policy of prejudice against owners of newspapers and radio stations has been adopted as the determinative factor in deciding hearings. If *Scripps Howard* is authority for denying an otherwise superior applicant because of its connection

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[22] This Court denied Scripps-Howard's petition for a writ of certiorari, 342 U.S. 830. In its petition, Scripps-Howard contended that it had been disqualified because of its newspaper affiliation. Petition in Case No. 228, 1951 Term, pp. 13-14. The Commission, in its brief in opposition to the petition, stated that Scripps-Howard had not been disqualified; that diversity had been considered only as one element, *among others, favoring* the opposing applicant in determining whether the grant was in the public interest; and that such consideration of the diversity factor was within the Commission's power. Government's Opposition to Petition for Certiorari in Case No. 228, 1951 Term, pp. 8-9.

with other media of mass communication, that decision is contrary to law.

The two other principal circuit court decisions in the area, which, like the present case, were decided by the Court of Appeals for the District of Columbia Circuit, are *Stahlman* v. *Federal Communications Commission, supra,* and *Tri-State Broadcasting Co., Inc.* v. *Federal Communications Commission, supra.* Neither of those cases intimate that the Commission may decide against a mass-media applicant or any other applicant solely because of his or its other business interests. Rather, both cases have language indicating the contrary. For example, in *Stahlman* the court said:

> "For we have previously held that there is nothing in the [Communications] Act which either prevents *or prejudices* the right of a newspaper, as such, to apply for and receive a license to operate a radio broadcast station. *Tri-State Broadcasting Co.* v. *Federal Communications Comm.,* 68 App. D.C. 292, 96 F.2d 564. Further consideration confirms that view." (Emphasis supplied.) 75 U.S. App. D.C. 176, 179, 126 F.2d 124, 127.[23]

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[23] The court went on to say that, although the Commission has wide power to grant licenses, this power is subject to the requirement that it act as public necessity and convenience require:

> "This, however, as the Supreme Court remarked [*in Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U.S. 470 (1940)], is not a grant of unlimited power, . . . It does not embrace and *should not be extended by implication* to embrace a ban on newspapers as such, for in that case it would follow that the power to exclude exists also as to schools and churches; and if to these, the interdict might be applied wherever the Commission chose to apply it." (Emphasis supplied).

This Court has never passed on the propriety of the diversification policy as a comparative factor in any context, and certainly has never been presented with the question involved in the present case. Admittedly, the Court has had occasion to note the existence of the basic policy. See *Federal Communications Commission* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 363-4 (1955);[24] *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission, supra.* But the major and dangerous extension of the policy as applied in this case has never been before this Court.[25]

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[24] The *Allentown* case was cited in *United States* v. *Storer Broadcasting Company*, 351 U.S. 192, 203, note 12. However, in view of the issues and opinions in *Allentown* and *Storer*, that note cannot be interpreted as a holding or even a *dictum* in approval of any phase of the diversification policy.

[25] As previously noted, the Court has approved the Commission's Multiple Ownership Rules. *United States* v. *Storer Broadcasting Company*, 351 U.S. 192 (1956). Aside from the fact that that case involved the legality of limitations against over-concentration of broadcast interests, as opposed to a bare policy favoring diversification of mass-media, another distinction between *Storer* and the present case is likewise important. The Multiple Ownership Rules were adopted by the Commission pursuant to a rule-making proceeding which included "extensive administrative hearings." *Id.*, at 205. The *Storer* case does not intimate that the Commission could have adopted a numerical limitation of general application on the permissible number of stations under the control of one licensee by the mere announcement of a policy to that effect. In the present case the Commission has applied a policy of apparent general application to the effect that mere ownership or control of other media of mass communication, without any accompanying threat of monopoly or over-concentration of control of mass-media, is necessarily undesirable. And this policy has evolved without benefit of rule-making proceedings. *Cf. Stahlman* v. *Federal Communications Commission*, 75 U.S.

The single statutory criterion which ultimately is to govern the Commission's licensing power is the "public interest, convenience, or necessity." 47 U.S.C. §§ 307, 309 and 310. "This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. * * * The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services . . ." *Federal Radio Comm.* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933). And this Court has said, in speaking of the duties of the Commission in comparative cases:

> ". . . 'the commission must determine from among applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138, n. 2 (1940)."[26]

Still further, in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940), the Court pointed out that "the broadcasting field is open to anyone." Thus, the service to be provided, rather than the various criteria selected by the Commission as determining who should be

App. D.C. 176, 126 F.2d 124 (1942), where the court specifically pointed out that the Commission could not adopt a rule or policy which would prejudice the right of a mass-media applicant to obtain a grant.

[26] See also *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C. 40, 175 F.2d 351 (1949); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

preferred among competing applicants, is the important consideration. *Federal Communications Commission* v. *Pottsville Broadcasting Co., supra.*

But in the instant case, the Commission, with the subsequent approval of the Court of Appeals, has not granted the application which is likely to bring the best service to the public. No suggestion has been made by either the court below or the Commission that Telecaster's would provide the better service. Rather, it is conceded that McClatchy "[I]n a measure" will "give more . . . service." Id., at 138. Nevertheless, without relating its action to the "public interest, convenience or necessity," except by a mere pronouncement that the action will benefit the public, the Commission has granted the television facility here in issue to Telecasters, the inferior applicant.

Moreover, it is settled that the Commission, in the proper exercise of its statutory authority, may not adopt a policy, or dispose of a decision, on the basis of "[G]eneralities unrelated to the living problems of radio communication." *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219 (1943). Before applying a policy, the Commission "must at least warrant, as it were, that . . . [the policy] would serve some beneficial purpose such as maintaining good service or improving it." *Federal Communications Commission* v. *RCA Communications,* 346 U.S. 86, 97 (1953). Nowhere has the Commission indicated here how the public interest would be better served by a grant to Telecasters over McClatchy. The Commission has simply made a gratuitous announcement to the effect that a "new view" (even where there are other and presumably adequate existing "views"), and "another directly competitive service" (even

where there is adequate competition among existing services) are in the public interest (R. 118).[27] The ruling of the Commission is in excess of its statutory powers because premised upon a bare policy favoring diversification of the media of mass communication—a policy which, as an end in and of itself, is wholly unrelated to public interest.[28]

III.

The Question Presented Is of Tremendous Importance in the Future Administration of the Communications Act

That the diversification principle, as here extended and applied, is far reaching and important in the administration of the Communications Act, is patent

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[27] With respect to whether additional competition, or any competition for that matter, is necessarily in the public interest, see *Federal Communications Commission* v. *R.C.A. Communications*, 346 U.S. 86 (1953). "Merely to assume that competition is bound to be of advantage in an industry so regulated and so largely closed as is this one, is not enough." *Id.*, at 97.

[28] The Examiner's view of the diversification policy was stated in these terms:

> "The dissemination of public information involves a process of selection and presentation wherein the human element plays an important role and the end product, both quantitatively and qualitatively, inevitably bears the imprint of the producer. In a society dedicated to the free exchange of ideas it is imperative, that, when avoidable, the public not be placed in a position of dependence upon a single source, or narrow group of sources, for its day-to-day information. Diversification of the ownership of public information media, of course, protects against such monopolistic situations. *But diversification is not an end in and of itself and where monopoly, or the threat of monopoly, does not exist such precedents lose force.*" (Emphasis supplied.) (R. 43).

from a consideration of the large number of comparative broadcast cases which come before the Commission in which a newspaper or experienced broadcast applicant is involved. For example, as of December 31, 1956, there were at least 20 comparative television proceedings alone in hearing status before the Commission in which diversification of the media of mass communications is potentially involved.[29] Further, although it is impossible to prognosticate as to the future frequency of a diversification issue in comparative proceedings before the Commission, past experience shows that the issue is of increasing significance. See *supra*, Part I. Under the decision below, the Commission has a free hand, so to speak, to deny the mass-media applicant in any one or all of those cases, or the mass-media applicant in any future case, no matter how superior such applicant is in comparison to other competing applicants. And, of course, the Commission can do so without regard to whether or not it finds that a grant to the mass-media applicant would be contrary to the public interest because of a resulting undue concentration of control of mass media, and further without regard to whether a grant to the mass-media applicant would threaten monopolization of local mass media. The decision invites arbitrary action and discrimination against experienced broadcasters and newspaper owners, both when applying for new facilities and even when applying for renewals of existing facilities.

The Commission has applied a factor in choosing beween two qualified applicants which relates not to the type of service which either will render to the

[29] See F.C.C. document no. 40263, "Television Applications in Hearing Status December 31, 1956."

public but to some obscure objective which the Commission has itself not seen fit to define or delineate. This factor of diversification of media is purely an economic doctrine, conceived by the Commission apparently in 1940 and applied since then in many cases as one of the criteria by which the better qualified applicant is supposedly chosen. However, the Commission, in the present case, has elevated diversity of media as a factor in so far as its weight and elasticity are concerned to such an extent that diversity has outweighed all other factors which the Commission employs to choose between competing applicants for a facility. The Commission has thus created a bludgeon with which it may strike down an applicant regardless of how superior it may be in any of the usual areas of comparison, i.e., past and future programming, sensitivity to public needs of the community, experience, proposals of technical facilities, etc. In effect the Commission seeks to use the diversity of media factor in such a way that arbitrary and capricious action results. The Commission must under the law have some logical and reasonable basis for evaluation of factors of preference. Otherwise it could arbitrarily pick any factor at will and make such factor determinative of a decision irrespective of the relation of such factor to the public interest to be served.

In this connection it is important to note the broad language employed by the Court of Appeals in approving the use of the policy of diversification. The Court stated that the Commission is entitled to consider diversification and "to attach such significance to it as its judgment dictates"; and further that diversification may be the determinative factor in a comparative case if the Commission "reasonably concludes that it is proper to do so" (R. 347, App. 6).

Of course, if the diversification policy can be applied legally to defeat a superior applicant, in the absence of a showing of undue control or threat of monopolization, the Commission has some discretion with respect to the weight to be accorded the policy in a particular case. However, the fact that the Commission must exercise discretion when applying legal criteria, makes it more important to examine the propriety of the criteria it seeks to apply. And where, as here, the criteria under examination has extensive ramifications in terms of frequency of application, and, in effect, amounts to discrimination against a large group of interested broadcast applicants, it is doubly important that the legality of the Commission's policy receive final judicial scrutiny.

The diversification policy as extended and applied in the present case has the net effect of excluding the applicant for a broadcasting facility who is the best qualified to serve the public, by subordinating public interest to some theoretical principle having no basis in law or experience. The policy discriminates against those who pioneered the development of commercial radio and television broadcasting — *viz.*, today's experienced broadcasters—on the basis of nothing more than the *ipse dixit* of authority.

IV.

The Commission's Application of the Diversification Policy Is Contrary to Congressional Intent

Additional evidence showing the diversification policy, as here extended, to be beyond Commission authority is contained in certain recent legislative history. The Communications Act was left unchanged by the 1952 amendments to the Act[30] only because the

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[30] 66 Stat. 711, 47 U.S.C.A. § 151, *et seq.*

Commission represented to Congress that it did not discriminate against applicants because of the businesses in which they were engaged.[31] Congress never intended that the diversity factor should be applied in the manner that it has been here. Congress never intended that an applicant should, in effect, be disqualified merely because it was associated with newspapers and other broadcast stations. This is evident from the legislative history preceding the 1952 amendments to the Communications Act.[32]

In 1949, an amendment was proposed to the Communications Act of 1934. This amendment, which was subsequently reported out of the Senate Committee on Interstate and Foreign Commerce of the 81st Congress, 1st Session, as contained in S. 1973, proposed to amend Part I of Title III of the Act by adding the following new section:

> "LIMITATION ON RULE-MAKING POWERS: DISCRIMINATION PROHIBITED
>
> "Sec. 332. No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the Commission and as authorized by law. The Commission shall make or promulgate no rule or regulation of substance or procedure, the purpose or result of which is to effect a discrimination between persons based upon race, religious or political affiliation *or kind of lawful occupation or business association.*" (Emphasis supplied.)

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[31] See S. Rep. No. 741, 81st Cong. 1st Sess. (1949), pp. 2-3, and Conference Report on Communications Act Amendments, H.R. Rep. No. 2426, 82nd Cong., 2nd Sess. (1952), 18.

[32] See App. 20 *et seq.*, for a digest of pertinent portions of the legislative history of the Communications Act.

In the Senate Report to accompany S. 1973 the Committee on Interstate and Foreign Commerce made the following statement with regard to the elimination of the so-called anti-discrimination section:

> "The committee deems it important to point out why this section was dropped from the bill . . .
>
> "In testimony on the bill (S. 1973) before this committee, the Commission spokesman pointed out that present Commission practice and procedure has been in accord with the proposed section for several years; that they have serious doubts of the constitutionality of any rule which would prohibit the granting of a license to anyone because of kind of lawful occupation; and that in any event they could not constitutionally do what the proposed section . . . would have prohibited them from doing.
>
> "The committee is impressed by the validity of this testimony. In view of the positive nature of the affirmations by the Commission that its existing procedure is in accord with that which had been intended by the original language, some question was raised as to whether or not the proposed new language might not be construed or interpreted to provide a different or modified procedure from that now being followed. The committee, therefore, decided to eliminate the proposed section. *It should be distinctly understood that in eliminating this section the committee has done so solely because the Commission is now following the procedure which was outlined in the section, has testified that it intends to follow that procedure, and that it is of the opinion that it has no legal or constitutional authority to follow any other procedure.*"[33] (Emphasis supplied.)

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[33] S. Rep. 741, 81st Cong., 1st Sess. (1949), 2-3. (App. 27-28).

In 1952, the Congress again considered the question of amending the Communications Act so as to provide for an anti-discrimination clause. Senate Bill 658, to further amend the Communications Act of 1934, was referred to the Committee on Interstate and Foreign Commerce of the House of Representatives. In its section-by-section explanation of S. 658, as contained in its Report, we find the following explanation of the purpose of the anti-discrimination clause (H.R. Rep. No. 1750 to accompany S. 658, at p. 9):

> "The new subsection deals with the question of how newspapers are to be treated with respect to the granting of construction permits and station licenses. It provides that the Commission shall not make or promulgate any rule or regulation *of substance or procedure,* the purpose or result of which is to effect a *discrimination between persons based upon interest in, association with, or ownership of any medium primarily engaged in the gathering and dissemination of information* and that no application for a construction permit or a station license, or for the renewal, modification, or transfer of such a permit or license, shall be denied by the Commission *solely* because of any such interest, association, or ownership." (Emphasis supplied.)

The anti-discrimination section was deleted from the amendment, however. The reason for its deletion is explained in the House Conference Report,[34] as follows:

> "The Senate bill contained no such provision, and the provision is not included in the conference substitute. This provision was omitted

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[34] H.R. Rep. No. 2426, 82nd Cong., 2nd Sess. (1952), 18-19 (App. 29).

> from the conference substitute because the committee of conference felt that it was *unnecessary*. It is the view of the conference committee that under the present law the Commission *is not authorized* to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or association with, a newspaper or other medium for gathering and disseminating information. Also the Commission could not arbitrarily deny any application *solely* because of any such interest or association." (Emphasis supplied.)

As indicated, the Committee of Conference eliminated the anti-discrimination section as being unnecessary, for under the present law the Commission could not discriminate against any applicant merely because of interest in, or association with, a newspaper or other medium for gathering and disseminating information and could not arbitrarily deny an applicant solely because of such interest or association. It is to be noted that this occurred subsequent to the decision in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,*[35] and the Commission's decision in *Hearst Radio, Inc.* (*WBAL*),[36] and that, although the anti-discrimination section was not enacted, there was, in effect, Congressional approval of the decision of the majority in the latter case with regard to the application of the factor of diversification.[37] The majority of the Com-

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[35] 89 U.S. App. D.C. 13, 189 F.2d 677, *cert. denied,* 342 U.S. 830 (1951).

[36] 6 Pike & Fischer R.R. 994 (1951).

[37] See App. 50-51.

mission in that case held that diversification was not a determinative factor for, although Hearst had a multiple broadcast and newspaper interests, they did not have a local monopoly and the common control of a local radio station and newspaper had not been employed adversely to the interests of the listening public.

CONCLUSION

The Commission held in the instant case that McClatchy was the superior applicant, but denied its application on the factor of diversification alone. This is completely contrary to the congressional intent and the statutory standard expressed in the Act. It is pure and simple discrimination based solely on the kind of business in which petitioner is engaged. For the foregoing reasons, it is respectfully urged that a Writ of Certiorari to review the judgment of the court below should be granted.

Respectfully submitted,

CLAIR L. STOUT
THOMAS H. WALL
JEROME H. HECKMAN
THOMAS J. DOUGHERTY
600 Munsey Building
Washington 4, D. C.

JOHN J. HAMLYN
McClatchy Broadcasting Company
21st and Q Streets
Sacramento, California
Attorneys for the Petitioner

DOW, LOHNES AND ALBERTSON
Of Counsel